

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD TAYLOR SMITH,

Defendant-Appellant.

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UNPUBLISHED

April 19, 2002

No. 227960

St. Clair Circuit Court

LC No. 00-000482-FH

Before: Talbot, P.J., and Gage and Wilder, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of four counts of third-degree criminal sexual conduct (CSC III) for committing incest with his daughter, MCL 750.520d(1)(d), and one count of third-degree child abuse for beating her with a belt. MCL 750.136b(5). The case arose after the victim accused defendant of forcing her to engage in various sexual acts with him from the time she was three or four years-old through age seventeen. The trial court sentenced defendant to concurrent terms of nine to fifteen years' imprisonment for each CSC III count, and one to two years' imprisonment for the child abuse count. We affirm.

Defendant first contends that the trial court improperly admitted evidence of the victim's allegations of prior similar acts. This Court reviews for a clear abuse of discretion the trial court's admission of evidence. *People v Knapp*, 244 Mich App 361, 377; 624 NW2d 227 (2001).

While evidence of other crimes or wrongs cannot be admitted to prove the defendant's character in order to show his action in conformity therewith, other acts evidence may be admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material," irrespective whether the other acts "are contemporaneous with, or prior or subsequent to" the charged conduct. MRE 404(b). To be properly admitted, a party must offer other acts evidence for a proper purpose under MRE 404(b), the evidence must be relevant under MRE 401 and 402, and its probative value must not be substantially outweighed by the danger of unfair prejudice under MRE 403. *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994). Evidence of other sexual acts between a defendant and the victim may be admissible if the defendant and the victim live in the same household and if, without that evidence, the victim's testimony would seem incredible. *People v Sabin (After*

*Remand*), 463 Mich 43, 69-70; 614 NW2d 888 (2000); *People v DerMartzex*, 390 Mich 410, 413-415; 213 NW2d 97 (1973).

The record reflects that in this case the prosecutor did not offer the other acts evidence to show defendant's propensity to commit incest, but for the proper purpose of showing the context in which defendant committed the charged acts of incest. The fact that the victim endured the charged incident and did not report it for several weeks may have appeared improbable unless the jury knew that the victim had lived with incest for nearly her entire life. *People v Dreyer*, 177 Mich App 735, 737-738; 442 NW2d 764 (1989). Furthermore, the other acts evidence lent credence to the victim's testimony that she reported the incest in part to protect her younger siblings from abuse. In light of the significant probative value of the other acts evidence to show the sexual familiarity between the victim and defendant and the fact that the references to the prior acts were very brief and contained no detail,<sup>1</sup> no danger of unfair prejudice existed that substantially outweighed the probative value of the other acts evidence. MRE 403; *DerMartzex*, *supra* at 413.<sup>2</sup> We conclude that the trial court did not abuse its discretion admitting the other acts testimony.

Defendant next argues that his trial counsel was ineffective. Because defendant did not move for an evidentiary hearing or new trial on the basis of ineffective assistance, our review of his claim is limited to mistakes apparent on the existing record. To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. The defendant further must demonstrate that a reasonable probability exists that but for counsel's error, the result of the proceedings would have been different and that the proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 713-714; \_\_\_ NW2d \_\_\_ (2001).

The first alleged instance of ineffective assistance involves defense counsel's failure to request a limiting instruction regarding the jury's proper consideration of the victim's testimony that defendant had abused her since age three or four. The reading of a cautionary instruction regarding the limited use of other acts evidence constitutes a discretionary matter, not a mandatory requirement. *Sabin*, *supra*, 463 Mich at 56. In denying defense counsel's motion to exclude the other acts testimony, the trial court assured the parties that it would limit the introduction of the prior acts to the victim's statement concerning the length of time defendant's abuse had persisted, "unless the Defense chooses for whatever reason to go into it." In light of the already limited nature of the other acts evidence and the fact that defense counsel's request of a limiting instruction might have drawn the jury's attention to the other acts, defense counsel's

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<sup>1</sup> The prosecutor inquired whether the victim knew "how long these unusual things had been happening to [her]," to which the victim replied, "since the age of three or four."

<sup>2</sup> Defendant further claims that the trial court improperly failed to instruct the jury regarding the limited permissible use it could make of the evidence of other sexual acts. Because defendant failed to request a limiting instruction from the trial court, this Court will grant relief only when necessary to avoid manifest injustice. *People v Sabin (On Second Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000). Given the brief and nondescriptive form in which evidence of the other acts was introduced, we cannot conclude that the absence of a limiting instruction affected the outcome of defendant's trial.

decision to forego a limiting instruction appears to reflect a matter of trial strategy that this Court will not second guess on appeal. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).<sup>3</sup>

Defendant also complains that his counsel failed to object to the absence of advance notice of the prosecutor's intention to utilize other acts evidence, which MRE 404(b)(2) requires. The record indicates that when defense counsel moved to exclude the other acts evidence, he had prior notice from a police report and from the victim's testimony at defendant's preliminary examination that she alleged abuse dating back to when she was three years of age. The record further reflects that defense counsel, who raised the motion to exclude, had the opportunity to object to and defend against the other acts evidence before defendant's trial began. In light of the fact that defense counsel was prepared to challenge the other acts evidence, we find without merit defendant's suggestion that defense counsel rendered deficient performance in not objecting to the prosecutor's failure to file notice. *People v Hawkins*, 245 Mich App 439, 454-455; 628 NW2d 105 (2001) (finding that one of the aims of MRE 404(b)(2)'s notice requirement is to ensure that the defendant has an opportunity to object to and defend against other acts evidence). Likewise because defense counsel was prepared to challenge the evidence, which qualified as admissible in any event, we cannot conclude that counsel's failure to object to a lack of notice prejudiced defendant. *Hawkins, supra* at 456-457.

Defendant lastly asserts that defense counsel ineffectively failed to object to the victim's husband's hearsay testimony corroborating her story. Defendant apparently challenges the husband's statement, in response to the prosecutor's inquiry whether the victim had confided in him about "unusual" things "happening between [the victim] and [defendant]," that the victim "just opened up and . . . told me that . . . her father had been touching her inappropriately, that he had been committing indecent acts with her." Our review of the transcript convinces us that the prosecutor did not elicit this statement "to prove the truth of the matter asserted." MRE 801(c). The evidence was offered to illustrate that defendant fled to Las Vegas because he knew the victim had disclosed the abuse and that he might be subject to prosecution. Because the husband's statement was not offered for the truth of the matter asserted, it was not hearsay. MRE 801(c). Counsel cannot be deemed ineffective for failing to make a futile objection. *People v Armstrong*, 175 Mich App 181, 186; 437 NW2d 343 (1989).<sup>4</sup>

Affirmed.

/s/ Michael J. Talbot

/s/ Hilda R. Gage

/s/ Kurtis T. Wilder

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<sup>3</sup> Moreover, given the limited nature of the reference to other acts between defendant and the victim we cannot conclude that the absence of a limiting instruction affected the outcome of defendant's case.

<sup>4</sup> Even assuming that the challenged statement constituted hearsay to which defense counsel inexcusably failed to object, we could not conclude that admission of the challenged statement affected the outcome of defendant's trial in light of the victim's detailed testimony regarding defendant's abuse of her. *Rodgers, supra*.